STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2006
v	No. 260543 Wayne Circuit Court
OLIVER FRENCH, JR., Defendant-Appellant.	LC No. 94-010499-01

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

In 1995, defendant was found guilty but mentally ill of first-degree murder, MCL 750.316, second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. In a prior appeal, this Court affirmed defendant's convictions, and our Supreme Court denied his application for leave to appeal.[1] Defendant thereafter filed an application for a writ of habeas corpus in federal court, which, after lengthy proceedings, was eventually granted for the reason that defendant was deprived of his right to counsel at a critical stage in his first trial.[2] Defendant was retried and a jury again found defendant guilty but mentally ill of first-degree murder, second-degree murder, two counts of assault with intent to commit murder, and felony-firearm. He was sentenced to life imprisonment for the first-degree murder conviction, and 15 to 30 years each for the second-degree murder and assault convictions, all to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the shooting of several fellow union officials at Ford Motor Company's Dearborn Rouge plant on the morning of September 10, 1994. Defendant was convicted of first-degree murder for killing Ronald McTasney, convicted of second-degree murder for killing Gregory Couls, and convicted of two counts of assault with intent to commit

[1] *People v French*, unpublished opinion per curiam of the Court of Appeals, issued July 25, 1997 (Docket No. 186834), lv den 459 Mich 865 (1998).

[2] *French v Jones*, 114 F Supp 2d 638 (ED Mich, 2000), aff'd 282 F3d 893 (CA 6, 2002), cert gtd, vacated, and remanded for reconsideration, 535 US 1109; 122 S Ct 2324; 153 L Ed 2d 153 (2002), aff'd on remand 332 F3d 430 (CA 6, 2003).

murder for shooting William Bisbing and David Weitz. At trial, defendant did not contest the fact that he shot the men while in a rage, but argued that his anger and actions were the product of legal insanity.

Defendant first raises two claims that challenge the racial composition of the jury. Defendant, who is African-American, argues that African-Americans were underrepresented in his jury venire due to systematic exclusion inherent in the jury selection process in Wayne County. Defendant also argues that the prosecutor improperly exercised peremptory challenges to exclude African-American jurors from the jury, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Although the racial composition of the jury is not clear from the record, we will accept arguendo defendant's claim that only one of the 14 jurors and alternates selected was African-American.

At the time of jury selection, the trial court noted that approximately ten percent of the jurors in the jury venire were black. According to defendant, eight of the 62 jurors were black. Defendant argued in a post-trial motion for a new trial that, according to United States census figures, 42.2 percent of the population in Wayne County was African-American, and that the underrepresentation of African-Americans in his jury venire was due to potential jurors not returning questionnaires or failing to appear for jury duty. Defendant requested the opportunity to have a representative of the county jury commission testify at an evidentiary hearing. The trial court denied defendant's request for an evidentiary hearing and denied his motion for a new trial on this issue.

"To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000). Defendant argued below that there was systematic exclusion because of the disparity in the number of potential jurors who did not return questionnaires or did not appear for jury duty. Defendant has altered his position on appeal and now argues that Wayne County's jury selection system "siphons-off" residents living in Detroit to sit on juries in the 36th District Court. Defendant did not advance this theory below and did not provide, in the trial court or on appeal, any factual support that supports his theory. Although we agree with defendant's recitation of the harms inherent in systematic exclusion, a defendant must do more than merely assert allegations of exclusion. *People v Williams*, 241 Mich App 519, 526-527; 616 NW2d 710 (2000). "Defendant has the burden of demonstrating a problem inherent within the selection process that results in systematic exclusion." *Id*. at 527. Here, defendant failed to meet his burden in this case, because he only asserts that his underrepresented venire "apparently result[ed]" from improper "siphoning." Defendant does not elaborate on or provide factual support for his theory, and ultimately relies only on his speculative allegations. Therefore, we reject defendant's argument. See *id*.

Defendant also argues that the prosecutor improperly exercised a peremptory challenge to exclude an African-American juror. We disagree. Although defendant limits his argument to the dismissal of one juror, we note that two African-American jurors were dismissed below by peremptory challenge. The trial court found that the prosecutor provided race-neutral reasons for excusing both jurors. We agree with that assessment. One of the jurors admitted that she was arrested for domestic violence and held in custody for 20 hours, but was never charged with an

offense. The other juror had a relative who had been arrested for kidnapping and assault. The prosecutor excused these jurors because of their past experience with the criminal justice system. Under the circumstances, the trial court did not err in determining that the prosecutor dismissed the jurors for credible and race-neutral reasons, regardless of the jurors' assurances that they could be fair to both sides. *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005).

Defendant next argues that the evidence of his insanity was overwhelming and, therefore, the jury's verdict was against the great weight of the evidence. We disagree. Resolution of the insanity issue depended on the jury's assessment of the credibility and weight of the parties' expert witnesses. None of the experts were impeached to the point that the jury could not accept their opinion regarding defendant's mental state. Therefore, we defer to the jury's assessment of the credibility and reliability of the witnesses, and the evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

Defendant next argues that the prosecutor improperly used hearsay statements in his questioning of defendant's expert witness. We disagree. During the prosecutor's cross-examination of defendant's psychiatric expert, Dr. Rahn Bailey, the prosecutor referred to the report of the prosecution's expert psychologist, Dr. Charles Clark, to question Dr. Bailey about defendant's history of assaultive behavior before this incident. In 1986, defendant grabbed the blouse of a female claims adjustor and shouted obscenities at her. In 1988 or 1989, defendant picked up a coworker, started to shake him, and then grabbed him by the throat. In a third incident in 1991, a verbal exchange between defendant and a service manager at a car dealership escalated into a physical altercation. Defendant grabbed and shook the service manager, who ended up hitting his head on a car. These incidents were revealed to the jury through the prosecutor's leading questions on cross-examination and the expert witnesses' response to the questions. Defendant now contends that the cross-examination questioning allowed the jury to consider statements made by the alleged victims of these prior incidents as substantive evidence without permitting defendant to cross-examine the victims, contrary to several rules of law.

Although some of the information about defendant's prior assaultive behavior apparently came from out-of-court statements made by the alleged victims of those incidents, the record also reflects that defendant admitted the incidents to the reviewing experts. Therefore, it is unclear which testimony about the incidents was hearsay, which was non-hearsay, and which fit within a hearsay exception. The only fact clearly reflected in the record is that the defense directly facilitated the reliance on hearsay by allowing each of defendant's experts to form their professional opinions on the basis of compiled documents and other external sources, the admissibility of which was never challenged or verified at trial. Cf. MRE 703. Defense counsel strategically elicited that his experts had considered all the police reports, reports of other mental health professionals, and all other relevant data in determining that defendant was insane at the time of the shootings. Although technically improper under MRE 703, neither attorney objected, and defense counsel proceeded to reveal, through his experts, myriad details about defendant's past. The personal, intimate, and often tragic circumstances of defendant's life presented a defensible psychological profile to the jury, but none of the details were rooted in earlier testimony or trial exhibits. Cf. MRE 703. Defendant did not object when his experts expressly grounded their psychiatric and psychological findings and conclusions on data which he now claims are inappropriate and inadmissible. Instead, he expressly encouraged the practice.

People v Griffin, 235 Mich App 27, 45-46; 597 NW2d 176 (1999). He elicited extensive testimony regarding the underlying information without laying any foundation for its admissibility into evidence. Under the circumstances, defendant waived the prosecutor's exploration of the informational basis supporting the experts' conclusions. *Id*.; see *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Once the witnesses confirmed that defendant had acknowledged the incidents, their use as substantive evidence against him was appropriate. MRE 801(d)(2). Moreover, the prosecutor's introduction of defendant's behavior in particular circumstances clearly responded to defendant's use of the similar other-acts evidence to support his insanity claim, so defendant's MRE 404(b) argument necessarily fails. MRE 404(a)(1). Finally, because defendant waived reference to any inadmissible underlying facts and admitted to the evaluating experts the essential factual underpinnings of the challenged incidents, defendant fails to demonstrate how he was deprived of his right to confront the witnesses against him. Cf. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant next argues that he received ineffective assistance of counsel, because his counsel failed to object to the alleged hearsay evidence, failed to argue that defendant's high blood pressure medication contributed to his insanity, failed to challenge a juror, and failed to directly question the jury about racial prejudice. We disagree. Defendant's sole claim on appeal is that he received ineffective assistance of counsel during the course of the trial because his counsel conceded that he had a weapon. We disagree. Because defendant did not raise the issue in the trial court or seek a *Ginther*[3] hearing, we limit our review of defendant's claims to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id*. at 140, citations omitted.]

Taking the allegations in order, defendant's use of his experts to bootstrap years of defendant's mental health history into the trial clearly reflected a sound trial strategy. In fact, defendant plainly attempted to use the "hearsay" incidents as further evidence of defendant's lack of control over his actions.

Defense counsel's decision not to blame defendant's high blood pressure medication for his insanity was also sound trial strategy. At defendant's first trial, one of his experts opined that defendant's behavior was consistent with side effects from his blood pressure medication. At defendant's second trial nine years later, defendant's expert recanted, stating that much more is

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

now known about the drug and that the drug was no longer a basis for his opinion that defendant was insane. The prosecution expert opined, without rebuttal, that the original expert's opinion to that effect was rooted in a total misunderstanding of defendant's dosage. On this record, defendant has not overcome our presumption that trial counsel made a sound strategic decision not to pursue this theory at his second trial. *Id.* To support the balance of his claims, defendant relies on his own affidavit. He failed to raise the factual basis for these issues or submit the affidavit below, so these issues are not properly before us. *Id.* at 139.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood